(1)

90-217

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JUDITH A. BROWN AND AMERICAN LIFE LEAGUE, INC.,
Petitioners,

v.

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S SUBURBAN CLINIC AND
NORTHEAST WOMEN'S CENTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 31, 1990

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QUESTIONS PRESENTED

1. Whether a district court has jurisdiction to impose Federal Rule of Civil Procedure 11 sanctions when the FRCivP 11 motion is filed subsequent to the plaintiffs' voluntary dismissal pursuant to FRCivP 42(a)(2)?

2. Whether a court of appeals panel may deny merits review of an otherwise reviewable issue—district court denial of FRCivP 11 sanctions—when (1) circuit internal operating procedures require a panel not to overrule another panel; (2) a prior panel has announced a "supervisory rule" depriving the district court of jurisdiction; and (3) in another case, a third panel, ignoring the supervisory rule, reviews on the merits?

PARTIES TO THE PROCEEDINGS

There is no parent or subsidiary company to be listed with respect to Petitioner American Life League, Inc. Rule 29.1.

Originally there were eleven Plaintiffs before the District Court. The District Court dismissed on December 5, 1988 fictitious-name Plaintiffs Jane Roe and Mary Moe and on December 20, 1988 Plaintiffs Planned Parenthood of Pennsylvania, Reproductive Health and Counseling Center, Allentown Women's Center, National Abortion Rights Action League of Pennsylvania, Women's Medical Services and Allen Kline; leaving the three captioned Defendants, now Respondents herein.

Originally there were 28 Defendants. During the course of the litigation Petitioners and 22 other Defendants were dismissed. The 24 dismissed Defendants, in addition to Petitioners, were Reverend James P. Lisante; Pro-life Nonviolent Action Project of Bronx, New York; Thomas Herlihy; Pro-life Nonviolent Action Project of Philadelphia; Chester County Citizens Concerned About Life; John J. O'Brien; Council for the Sanctity of Human Life; Advocates for Life; Andrew Burnett; Direct Action Committee; Kathy Hoffer; Craig Hoffer; Life and Family Center; Andrew Schulberg; Pro-life Action League; Joseph Scheidler; Pro-life Direct Action League; John Ryan; Omaha Christian Action Council; Denny Hartford; Pro-life Nonviolent Action Project of Washington, D.C.; John Cavanaugh O'Keefe; fictitious-name John Smith(s) and fictitious-name Jane Smith(s). The surviving Defendants were Operation Rescue, Randall Terry, Michael McMonagle and Joseph Foreman.

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IN THE

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OCTOBER TERM, 1990

No.

JUDITH A. BROWN AND AMERICAN LIFE LEAGUE, INC.,
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ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S SUBURBAN CLINIC AND
NORTHEAST WOMEN'S CENTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Mrs. Judith A. Brown and American Life League, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported. Appendix, infra, 1a. The opinion of the United States District Court for the Eastern District of Pennsylvania denying sanctions also is unreported. App 7a.

JURISDICTION

Invoking federal jurisdiction under 28 USC §§1331, 1334 and 1964, 42 USC §1985(3) and the doctrine of pendent jurisdiction, Plaintiffs below brought this suit against Petitioners and 26 other Defendants in the Eastern District of Pennsylvania. On March 7, 1989, the District Court dismissed Petitioners, with prejudice. Thereafter, Petitioners moved for sanctions under FRCivP 11. On June 19, 1989, the District Court denied the motion.

Petitioners appealed to the Third Circuit, which affirmed on February 7, 1990. Petitioners sought rehearing in banc, which the Third Circuit denied on May 7, 1990.

On June 5, 1990, Justice Brennan ordered that the time for filing this Petition for Writ of Certiorari be extended to and including August 1, 1990.

The jurisdiction of this honorable Court is invoked pursuant to 28 USC ¶1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners filed for sanctions against all original Plaintiffs, their attorneys and the Women's Law Center, which then employed the attorney who signed the Complaint, pursuant to FRCivP 11, which provides in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . .; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the

> extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the expenses reasonably incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee.

Petitioners on January 31, 1989 had filed for summary judgment. Two days later, on February 2, Plaintiffs filed to dismiss without prejudice under FRCivP 41(a)(2). On February 21 the District Court denied to Plaintiffs dismissal without prejudice and allowed Plaintiffs to seek dismissal with prejudice. On March 7 the District Court dismissed with prejudice. On May 17 Petitioners filed their FRCivP 11 sanctions motion.

FRCivP 41(a)(2) pertinently reads:

> . . . An action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper . . . . Unless otherwise specified in the order a dismissal under this paragraph is without prejudice.

STATEMENT OF THE CASE

Petitioner Judith A. Brown, a Virginia resident, is President of Petitioner American Life League, Inc.

("ALL"), a District of Columbia corporation, with its office in Stafford, Virginia. ALL is recognized under 26 USC §501(c)(3) as a tax-exempt organization. ALL is a social welfare and educational organization, incorporated in 1981, with some 240 thousand active donors across the country.

ALL researches and publishes a magazine, newsletters, brochures and other material relating to the human rights of persons born and unborn; sponsors, and participates in, symposia and other public and invitational means of discussion and education; monitors, and reports upon, pertinent state and federal administrative, legislative and judicial developments; and otherwise seeks to fulfill the mandate of its Articles of Incorporation and the concerns of its donors. Its professional and volunteer staff includes scientists, theologians, public administrators, lawyers and other persons who are, or who have become, cognizant in areas of factual and interpretive knowledge as to biological, theological, philosophic, legal, political and economic aspects of the rights of persons born and unborn.

The litigation herein began with the verification and filing of the Complaint on June 29, 1988—although not served upon Petitioners until August 24.

Injunctive proceedings, including the initial issuance on June 30 (ex parte as to Petitioners) of a Temporary Restraining Order, occurred during the course of the case, running through at least July 14, 1989. Petitioners Brown and ALL had no role in these proceedings nor in contempt proceedings which Plaintiffs brought as to sundry Defendants other than Petitioners.

Demonstrations about which Plaintiffs complained, and which were, inter alia, the subject of the June 30, 1988 Temporary Restraining Order, occurred during the week of July 4. Petitioners Brown and ALL had no role in these demonstrations. Plaintiffs had that knowledge before they served Petitioners, which did not occur until August 24, 1988.

Upon Plaintiffs' motion, the District Court dismissed all Plaintiffs' damages claims (other than those against the contempt Respondents) and 4 of 8 counts of the Complaint, leaving (exclusive of claims against the contempt Respondents) 4 counts and an attorneys fee claim against 4 of 28 original named Defendants, other than Petitioners.[1]

After discovery, Petitioners moved on January 31, 1989 for summary judgment. Two days later, on February 2, Plaintiffs moved for voluntary dismissal under FRCivP 41(a)(2). On February 21 the District Court denied dismissal without prejudice and allowed Plaintiffs to seek dismissal with prejudice. On March 7 the District Court so dismissed Petitioners Brown and ALL (and three others), thereby leaving 4 of 28 original named Defendants.

On May 17 Petitioners filed for FRCivP 11 sanctions. On June 19 the District Court denied sanctions. App 7a. On June 29 Petitioners moved for reconsideration, which was denied on July 11.

On August 8 Petitioners appealed. On appeal, Petitioners argued that the District Court misinterpreted *Mary Ann Pensiero, Inc. v. Lingle*, 847 F 2d

[1] Plaintiffs unsuccessfully sought certification of the Physician Class. The District Court certified the Womens' Class and subsequently decertified it.

90 (3rd Cir, 1988), in holding that it lacked authority to grant FRCivP 11 sanctions; and that, upon the merits at bar, the District Court abused its discretion in denying sanctions because Plaintiffs made no reasonable inquiry but included Petitioners solely upon the basis of the nominal cosponsorship by Petitioner ALL of a New York Operation Rescue, April 30-May 7, 1988, when Plaintiffs had almost two months to investigate before they filed the Complaint, another 56 days to investigate between the filing of the Complaint and service, and the demonstrations complained of were history more than a month prior to the time Plaintiffs served Petitioners. Counsel also had warned Counsel for Plaintiffs that there was no evidence of Petitioners' involvement and that process should not be served.[2]

The Court of Appeals sustained the District Court, holding that pursuant to the Third Circuit Internal Operating Procedures one panel could not reverse another and that the supervisory rule in *Pensiero* was a bar.

Seeking reconsideration, Petitioners argued that they effectively were denied an appeal because the

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[2] More particularly, Petitioners argued that the *Pensiero* rule was a dictum to the case, not a binding rule; that the *Pensiero* dictum was inapplicable to the proceedings at bar when the District Court invoked it because it applied only to proceedings subsequent to the final judgment below; that the *Pensiero* rationale was inapplicable upon the facts; that *Pensiero* if a supervisory rule or a district court rule was promulgated unlawfully; and that if *Pensiero* properly constituted a mandatory rule, application would be unjustified under *Frazier v. Heebe*, 482 US 641 (1987). Petitioners also argued the substantive merits under the facts at bar.

panel held it lacked authority; that the *Pensiero* supervisory rule is merely a dictum; that, in fact, Petitioners did file for sanctions before final judgment, FRCivP 54(b);[3] that the mischief *Pensiero* is designed to avoid, a multiplicity of appeals, could not occur at bar because there could be, and was, but the one appeal by Petitioners[4] and that, on the merits, sanctions should have been awarded. The Court of Appeals denied rehearing in banc. App 14a.

This timely Petition follows.

REASONS FOR GRANTING THE PETITION

I. There Is A Split Of Authority Over Whether A District Court May Impose FRCivP 11 Sanctions When The Motion For Sanctions Is Filed Subsequent To A Voluntary Dismissal Pursuant To FRCivP 41(a); It Is Unclear Whether All FRCivP 11 Motions Survive Voluntary Dismissal.

FRCivP 11 may or may not have become the cottage industry of the litigation bar,[5] but in any event it is the subject of considerable litigation and commentary,[6] and twice during the October 1989 Term

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[3] In view of the District Court's modification of the permanent injunction on June 9 and July 14, 1989, after the filing of Petitioners' FRCivP 11 motion—a point Petitions do not pursue herein.

[4] Certain other Defendants, approximately contemporaneously, filed an unrelated appeal, in which Petitioners neither were parties nor participants.

[5] Vairo, *Rule 11: A Critical Analysis*, 118 FRD 189, 199 (1988).

[6] E.g., American Bar Association Section of Litigation, *Sanctions: Rule 11 and Other Powers*, 2d edition (1988); Nelken, *Sanctions Under Amended Federal Rule—Some "Chilling" Prob-*

was visited by this Court. In addition to *Pavelic & LeFlore v. Marvell Entertainment Group*, 493 US ___ (1990), this Court also decided, inter alia, in *Cooter & Gell v. Hartmarx Corporation*, 58 USLW 4763 (June 11, 1990), that a voluntary FRCivP 41 (a)(1)(i) dismissal does not deprive a district court of jurisdiction over an FRCivP 11 motion filed before dismissal. This Court stops short of (1) extending that holding to a FRCivP 41(a)(2) dismissal or (2) holding that such dismissal does not deprive a district court of jurisdiction over an FRCivP 11 motion filed after, not before, the dismissal, inasmuch as those issues were not raised in *Cooter & Gell*.

Although the fertile minds of litigators may raise further questions, there are two obvious gaps: whether a district court has jurisdiction when the sanctions motion is filed after, not before, dismissal; and whether such jurisdiction survives an FRCivP 41(a)(2) dismissal as well as an FRCivP 41(a)(1) dismissal.

There is a conflict among circuits about timeliness.

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lems in the Struggle Between Compensation and Punishment, 74 Geo LJ 1313 (1986); THIRD CIRCUIT TASK FORCE ON FRCIVP 11 (1989); Note, *Plausible Pleading: Developing Standards For Rule 11 Sanctions*, 100 Harv L Rev 630 (1987); Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale LJ 901 (1988); Schwarzer, *Rule 11 Revisited*, 101 Harv L Rev 1013 (1988); Joseph, *The Trouble With Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 ABA J 87 (1987); Joseph, *Sanctions: The Federal Law of Litigation Abuse*, Michie Company (1989); Schwarzer, *Sanctions Under The New Federal Rule 11—A Closer Look*, 104 FRD 181 (1985); American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (Burbank, Reporter, 1989).

The Courts of Appeals for the First, Seventh, Eighth, Ninth and District of Columbia Circuits have held that District Court jurisdiction over an FRCivP 11 motion survives voluntary dismissal. *Muthig v. Brant Point Nantucket, Inc.*, 838 F 2d 600 (1st Cir, 1988); *Szabo Food Service, Inc. v. Canteen Corporation*, 823 F 2d 1073 (7th Cir, 1987), cert dismissed, 458 US 91 (1988); *Kurkowski v. Volcker*, 819 F 2d 201 (8th Cir, 1987); *Community Electric Service of Los Angeles, Inc. v. National Electrical Contractors Association, Inc.*, 869 F 2d 1235 (9th Cir, 1989), cert den, 110 S Ct 236; *Denik, Inc. v. Hartmarx Corporation*, 875 F 2d 890 (DC Cir, 1989), aff'd on point sub nom *Cooter & Gell v. Hartmarx Corporation*. The Second Circuit has held to the contrary. *Johnson Chemical Company, Inc. v. Home Care Products, Inc.*, 823 F 2d 28 (2d Cir, 1987). The Third Circuit has gone both ways. *Pensiero* and *Schering Corporation v. Vitarine Pharmaceuticals, Inc.*, 889 F 2d 490 (1989).

Factual patterns, like the specifics of the results, vary, further suggesting this Court should address the matter.

In *Muthig*, the parties dismissed by stipulation, FRCivP 41(a)(1)(ii), and two months thereafter Defendants filed for FRCivP 11 sanctions. In *Szabo*, FRCivP 41(a)(1)(i) voluntary dismissal occurred on October 17, 1986 and the FRCivP 11 motion was filed on November 14. In *Kurkowski*, Plaintiffs on March 3, 1986 filed for FRCivP 11 41(a) dismissal. The District Court dismissed on March 4, 1986 pursuant to FRCivP 41(a)(1)(i), without prejudice. Some Defendants then moved to "retain jurisdiction over the case and impose sanctions . . . " 819 F 2d, at 202.

On March 14 the District Court "modified its dismissal order so it could decide the sanctions issue." The District Court on March 31 held hearings and "later issued a written order granting sanctions." Ibid. Under either of two rationales, without signifying which or both, the Court of Appeals held that the District Court "possessed authority for the issuance of the post-dismissal order, imposing sanctions." Ibid, at 203.[7] Defendants' sanctions motion was filed within ten days of the original judgment. In *Community Electric Service*, Defendants filed for FRCivP 11 sanctions within thirty days of the entry of judgment. The Court disapprovingly noted *Pensiero*. 869 F 2d, at 1242.

To the contrary, *Johnson Chemical Company*, holds that once there is an FRCivP 41(a)(1)(i) dismissal, there is no further jurisdiction. The dismissal notice was filed on November 4, 1986. Subsequently Defendant filed under FRCivP 11 and the District Court vacated the voluntary dismissal and sanctioned. The Court of Appeals overturned both the voluntary dismissal and the imposition of sanctions, both on the ground of lack of jurisdiction.

Thus, this Court, in *Cooter & Gell*, resolved the conflict among circuits as to district court FRCivP 11

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[7] One rationale is that Defendants filed motions to dismiss before Plaintiffs voluntarily dismissed; that under FRCivP 12(b) "a defendant's motion to dismiss is transformed into a motion for summary judgment when matters outside the pleadings are also submitted . . . ", Ibid, at 203, and when a motion for summary judgment is outstanding, dismissal must be pursuant to FRCivP 41(a)(2) rather than automatic FRCivP 41(a)(1)(i) dismissal. The other rationale is "the district court's jurisdiction [in] its inherent authority over the cases and parties before it." Ibid, at 203.

jurisdiction when a voluntary dismissal occurs after the filing of the sanctions motion but has not taken the next step in resolving the same conflict when the sanctions motion is filed after such dismissal.

This Court's rationale in *Cooter & Gell* suggests no basis for a jurisdictional dichotomy based upon time of filing rather than time of sanctioning (or declining to sanction).

Likewise, this Court's *Cooter & Gell* rationale suggests no basis for a jurisdictional difference among FRCivP 41(a)(1)(i), 41(a)(1)(ii) and 41(a)(2) motions: each conceptually is the same result, achieved as a matter of right.[8]

II. The Third Circuit Has Created A System Wherein An FRCivP 11 Movant May Be Denied Its Right To A Merits Review of Sanctions Denial

Internal confusion exists within the Third Circuit as to restrictions upon a panel.

In *Pensiero*, a panel arguably promulgated a circuit-wide supervisory rule as to district court FRCivP 11 jurisdiction. If that promulgation is valid and binding, not only has another panel of the Third Circuit ignored it, *Schering*, but, by Internal Operating Procedures, not promulgated as rules, the Third Circuit purports to bind a panel to follow the decision of a predecessor panel, thereby denying an appellant the right to merits consideration of its appeal—the au-

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[8] Under FRCivP 41(a)(1)(i), a plaintiff voluntarily dismisses before an answer or dispositive motion has been filed. Under FRCivP 41(a)(1)(ii), the parties dismiss voluntarily by stipulation. Under FRCivP 41(a)(2), a plaintiff voluntarily dismisses after an answer and/or dispositive motion has been filed.

thority for which would be first impression before this Court. Under this Court's Rule 10.1.(a),

> while neither controlling nor fully measuring the Court's discretion, this Court gives consideration to a circumstance in which . . . a United States court of appeals . . . has so far departed from the excepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision.

Hence, this Court has an opportunity to resolve, upon first impression, the Third Circuit muddle. As it now stands, a panel of the Third Circuit arguably has promulgated a supervisory rule, which, by virtue of Internal Operating Procedures, cannot be challenged, regardless of the facts, by any other panel, thereby depriving an appellant of merits adjudication, yet the rule is ignored by at least one other panel.

The facts in the *Schering* case, both at the trial and appellate levels, pertinently are identical to those at bar, in that in each Defendants filed, under FRCivP 41(a)(1)(i) in *Schering* and under FRCivP 41(a)(2) at bar, after voluntary dismissal. At bar, the panel, perceiving the *Pensiero* supervisory rule and the Internal Operating Procedures as a bar, declined merits review. *Schering*, after a considerably more extended analysis, and only passingly citing *Pensiero*,[9] reviewed on the merits, pertinently stating:

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[9] The *Schering* panel citation to *Pensiero* is curious:

> . . . A district court, after entry of a final judgment and filing of a notice of appeal, retains the power to adjudicate collateral matters such as applications for counsel fees, *West v. Keve*, 721 F 2d 91, 95 n.5 (3d

> . . . to hold that a district court has no power to order sanctions after a voluntary dismissal is to emasculate Rule 11 and those cases where wily plaintiffs file baseless complaints, unnecessarily sap the precious resources of their adversaries and the courts, only to insulate themselves from sanctions by promptly filing a notice of dismissal.
>
> We hold the district court had jurisdiction to entertain and decide the Rule 11 motion after defendants suffered a voluntary dismissal under Rule 41(a)(1)(i). 889 F 2d at 496.

Thus, in *Schering*, a Third Circuit panel reviewed on the merits, ignoring *Pensiero* and the Internal Operating Procedures; at bar, a Third Circuit panel denied review on the merits, adhering to *Pensiero* and the Internal Operating Procedures.

Only this Court, exercising its supervisory powers, can restore to Petitioners their right to a merits review of sanctions denial and, in so doing, clear the Third Circuit muddle which prevents unlucky

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Cir. 1983), and motions for sanctions under Rule 11, *Mary Ann Pensiero, Inc. v. Lingle*, 847 F 2d 90, 98 (3d Cir. 1988).

In fact, *Pensiero* purports to announce a supervisory rule which takes sanctions adjudication out of the collateral category unless the motion is filed before dismissal of, or judgment on, the action. The *Schering* panel may mean that *Pensiero* permits sanctions review only if the sanctions motion is filed before district court dismissal or judgment. In that event, the *Schering* statement, while consistent with *Pensiero*, is inconsistent with the facts in *Schering* and with the majority position among the circuits.

appellants from obtaining the merits review to which they statutorily are entitled, 28 USC § 1291, while lucky appellants obtain such review.

CONCLUSION

For the foregoing reasons, Petitioners Judith A. Brown and American Life League, Inc. pray that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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July 31, 1990

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89-1672

JANE ROE; MARY MOE; NATIONAL ABORTION RIGHTS ACTION LEAGUE OF PENNSYLVANIA; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; REPRODUCTIVE HEALTH AND COUNSELING CENTER; WOMEN'S SUBURBAN CLINIC; ALLENTOWN WOMEN'S CENTER; NORTHEAST WOMEN'S CENTER; WOMEN'S MEDICAL SERVICES; DR. ALLEN KLINE

V.

OPERATION RESCUE; RANDALL TERRY; REVEREND JAMES P. LISANTE; PRO LIFE NONVIOLENT ACTION PROJECT OF BRONX, N.Y.; THOMAS HERLIHY; PRO LIFE NONVIOLENT ACTION PROJECT OF PHILADELPHIA; MICHAEL McMONAGLE; CHESTER COUNTY CITIZENS CONCERNED ABOUT LIFE; JOHN J. O'BRIEN; COUNCIL FOR THE SANCTITY OF HUMAN LIFE; JOSEPH FOREMAN; ADVOCATES FOR LIFE; ANDREW BURNETT; AMERICAN LIFE LEAGUE; JUDIE BROWN; DIRECT ACTION COMMITTEE; KATHY HOFFER; CRAIG HOFFER; LIFE AND FAMILY CENTER: ANDREW SCHULBERG; PRO LIFE ACTION LEAGUE: JOSEPH SCHEIDLER; PRO LIFE DIRECT ACTION LEAGUE: JOHN RYAN; OMAHA CHRISTIAN ACTION COUNCIL; DENNY HARTFORD; PRO LIFE NONVIOLENT ACTION PROJECT OF WASHINGTON, D.C.; JOHN CAVANAUGH O'KEEFE; SMITH(S), JOHN AND SMITH(S), JANE, the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of

defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein

JUDITH A. BROWN and AMERICAN LIFE LEAGUE, INC.,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 88-5157)
District Judge: Hon. Clarence C. Newcomer

Submitted Under Third Circuit Rule 12(6)
on January 19, 1990

Before: HIGGINBOTHAM, BECKER and NYGAARD,
Circuit Judges

(Opinion filed: FEB 7 1990)

MEMORANDUM OPINION

/s/ R. Nygaard
NYGAARD, *Circuit Judge*

Appellants, Judith A. Brown and American Life League, Inc. appeal an order by the district court denying their motion for Rule 11 sanctions. The district court, following *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988), held that appellants' motion was untimely because it was filed after the entry of final judgment. For the reasons that follow we will affirm.[1]

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[1] We can also affirm the district court's order as to all appellees except Kathryn Kolbert, who signed the complaint, under *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's decision denying a motion for rule 11 sanctions for abuse of discretion. *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551 (3d Cir. 1989). However, we exercise plenary review of the legal standards applied by the district court in exercising its discretion. *Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718 (3d Cir. 1988).

I.

On June 29, 1988, appellees—several abortion clinics, a women's abortion rights group and prospective patients—filed a complaint seeking injunctive relief to prevent several parties, including appellants, from engaging in protesting activity that would blockade patient access to abortion clinics in Philadelphia and its metropolitan area. The court issued a temporary restraining order on June 30, 1988. On February 2, 1989, appellees moved to voluntarily dismiss their action against appellants without prejudice. The court denied this motion but, on March 7, 1989, it granted appellees a voluntary dismissal with prejudice. On April 18, 1989, the district court entered a final judgment against the remaining defendants. On May 1, 1989, the court granted appellees motion for attorneys' fees and costs against the remaining defendants. On May 9, 1989, appellants filed their motion for Rule 11 sanctions against appellees.

A.

Appellants argue that the district court erred in holding that *Pensiero* required dismissal of appellants' Rule 11 mo-

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(1989). In *Pavelic*, the Supreme Court held that the phrase, "the person who signed it," contained in Rule 11 limits sanctions to the actual signer only and not her law firm. Under this reasoning, since Kathryn Kolbert is the only attorney who signed the complaint, only she could be subject to Rule 11 sanctions.

tion. Specifically, appellants argue that the rule in *Pensiero* is in dictum and therefore not a rule binding upon the district court. We disagree. In *Pensiero*, we stated,

> To carry out the objectives of expeditious disposition, we adopt as a supervisory rule for the courts in the Third Circuit a requirement that all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment. Where appropriate, such motions should be filed at an earlier time—as soon as practicable after discovery of the Rule 11 violation.

Pensiero, 847 F.2d at 100. This language is not dictum, but is a supervisory rule for district courts to follow which regulates the manner of appeals. *See Napier v. Thirty or more Unidentified Federal Agents*, 855 F.2d 1080, 1090 (3d Cir. 1988) (citing *Pensiero*, 847 F.2d at 92, as "adopting supervisory rule requiring counsel to file Rule 11 motions before entry of final judgment by district court 'to eliminate piecemeal appeals' ").

B.

Appellants next argue that if the language in *Pensiero* is a rule, that it is not a supervisory rule which the Court of Appeals is permitted to promulgate; rather it is a rule governing procedure in the district court. As such, the promulgation of such a rule by the court of appeals in an opinion violates Rule 83 of the Federal Rules of Civil Procedure. We disagree. The rule was promulgated to eliminate fragmented appeals and promote judicial efficiency. *Pensiero*, 847 F.2d at 99. The rule accomplishes those purposes, and is not, as characterized by appellants, a district court rule subject to the procedures of Rule 83 of the Federal Rules of Civil Procedure.

C.

Appellants next argue that, even if this rule is a supervisory rule, the court of appeals did not comply with

28 U.S.C. §§ 2071(b), 2071(d) and 2077(a) or Rule 47 of the Federal Rules of Appellate Procedure. Essentially, appellants ask us to reverse *Pensiero* because the panel in *Pensiero* did not comply with the law. However, under Rule 8-C of our Internal Operating Procedures a prior opinion of this court can be challenged only when the court of appeals sits in banc. We cannot reverse a prior panel's decision.

D.

Appellants next urge that even if the rule in *Pensiero* is proper, it should not be applied to them because the concerns justifying the rule in *Pensiero* do not exist here.[2] Appellants argue that *Pensiero* should not be applied to motions that are filed after a judgment but before an appeal because the motion for sanctions in *Pensiero* was filed post appeal. The rule in *Pensiero* is not so limited. It requires that all Rule 11 motions be filed *before* entry of *final judgment*. Furthermore, the procedure herein belies appellants' assertion that no fragmented appeals have occurred. Appellants' Rule 11 motion has generated an appeal separate from the appeal on the merits—the exact situation the rule in *Pensiero* was designed to prevent.

III.

Appellants failed to file their Rule 11 motion before the entry of final judgment. Under *Pensiero*, this failure is fatal to their motion. We shall affirm the order of the district court dismissing appellants' motion.

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[2] Appellants also argue that *Pensiero* does not apply because their motion was timely filed. They assert that the judgment entered against them on April 18, 1989 was not final because the court later modified the injunction. This argument fails. The finality of a permanent injunction issued by a district court is not destroyed when the district court modifies the injunction when necessary. *United States v. Local 30, et al*, 871 F.2d 401 (3d Cir. 1989).

TO THE CLERK:

Please file the foregoing opinion.

/s/ R. Nygaard
Circuit Judge

APPENDIX B

DISTRICT COURT OF PENNSYLVANIA

CIVIL ACTION NO. 88-5157

JANE ROE, *ET AL.*

v.

OPERATION RESCUE, *ET AL.*

FILED: JUN 19 1989

MEMORANDUM

Newcomer, J. June 19, 1989

This was an action for declaratory and injunctive relief sought against various anti-abortion activists. Because the factual background of this action appears in the court's Memorandum dated May 1, 1989, it need not be repeated here. This action began almost one year ago, and after several hearings and over two hundred documents filed in this case, the court is well acquainted with the litigation and the various parties and their counsel. Presently before the court are several defendants' motions for attorney's fees and sanctions under Fed. R. Civ. P. 11.

I. *The Instant Motions*

Presently before the court are the following motions: (1) defendant Joseph Foreman's motion for attorney's fees under Rule 11; (2) defendant Council for the Sanctity of Human Life's (CSHL) motion for attorney's fees under Rule 11; (3) defendants Judith Brown and American Life League, Inc.'s (ALL) motion for Rule 11 sanctions; and (4) defendant Chester County Citizens Concerned About Life's (CCCCAL) motion for attorney's fees under Rule 11. By way of back-

ground information, defendant Joseph Foreman was found in civil contempt for violating a temporary restraining order issued by this court. Foreman also had judgment entered against him on plaintiffs' § 1985(3) (right to travel), trespass, and intentional interference with contractual relations claims. Defendants CSHL, Judith Brown, ALL, and CCCCAL were named defendants who upon plaintiff's motion were dismissed with prejudice from the action on March 3, 1989, pursuant to Fed. R. Civ. P. 41(a)(2).

II. *Sanctions Under Fed. R. Civ. P. 11*

Under Rule 11, the signature of an attorney or party on pleadings and papers indicates that to the best of the signer's belief, the document is "well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . ." Fed. R. Civ. P. 11. To comply with these requirements, the attorney must conduct a "reasonable investigation of the facts and a normally competent level of legal research to support the presentation." *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 94 (3d Cir. 1988) (citation omitted). An objective standard of reasonableness under the circumstances at the time the paper was submitted is used for testing conduct under Rule 11, and "the wisdom of hindsight should be avoided." *Id.* at 94.

In deciding whether counsel's inquiry prior to filing the complaint is "reasonable" under Rule 11, the Third Circuit has cited five factors as relevant: the amount of time available to counsel for conducting the factual and legal investigation; the necessity for reliance on the client for the underlying factual information; the plausibility of the legal position advocated; whether the case was referred to counsel by another attorney; and the complexity of the legal and factual issues involved. *Pensiero*, 847 F.2d at 95. Sanctions under Rule 11 are appropriate "only if the filing of the complaint constituted abusive litigation or mis-

use of the court's process," *id.* at 95 (quoting *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir. 1988)), and are reserved "for only exceptional circumstances." *Pensiero*, 847 F.2d at 99.

III. *Discussion*

A. *Timeliness of the Rule 11 Motions*

In the instant litigation, defendants CSHL, Judith Brown, ALL, and CCCCAL were dismissed from the action with prejudice in an Order dated March 3, 1989. Final judgment against defendant Foreman and others was entered on April 18, 1989. The Third Circuit has adopted a supervisory rule for courts in this circuit that "all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment," if not earlier. *Pensiero*, 847 F.2d at 100. Defendants Foreman and CSHL filed their Rule 11 motions on May 9, 1989. Defendants Brown and ALL filed their Rule 11 motions on May 17, 1989, while defendant CCCCAL filed its Rule 11 motion on May 18, 1989. As each of the Rule 11 motions was filed *after* the entry of final judgment or dismissal from the case, they are untimely under the Third Circuit's supervisory rule announced in *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 98-100 (3d Cir. 1988), and therefore need not be considered by the court.

B. *Merits of the Rule 11 Motions*

Although the untimeliness of the filing of the motions obviates consideration on the merits, the court has considered the merits anyway. After such consideration, based on an objective standard of reasonableness, avoiding the wisdom of hindsight, and in light of the applicable legal standards, the court finds that plaintiffs' filing of the complaint against the instant defendants and their conduct of the subsequent litigation did not constitute "abusive litigation or misuse of the court's process." Furthermore, the court makes the following conclusions: (1) plaintiffs' inquiry prior to filing

the complaint was reasonable under Rule 11; (2) the dismissal of various defendants pursuant to Fed. R. Civ. P. 41(a)(2) in March 1989 does not indicate that a violation of Rule 11 occurred; (3) the dismissal of certain plaintiffs and certain causes of action does not indicate that a violation of Rule 11 occurred; and (4) none of the other arguments or criticisms of plaintiffs' conduct constitute violations of Rule 11. As the Third Circuit has noted, Rule 11 is misused "when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment." *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987). Some of the arguments advanced by defense counsel in the instant motions come dangerously close to constituting such misuse of the Rule.

In sum, the court finds that defendants have failed to show any "exceptional circumstances" warranting the imposition of Rule 11 sanctions.

C. *Motions for Attorney's Fees Under 42 U.S.C. § 1988*

Defendants Foreman and CSHL have also requested attorney's fees under 42 U.S.C. § 1988. Under § 1988, the court may allow reasonable attorney's fees to the prevailing party in a suit brought under 42 U.S.C. § 1985. A defendant may be considered a "prevailing party" under § 1988 "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983). *See, e.g., Curry v. A.H. Robins Co.*, 775 F.2d 212 (7th Cir. 1985) (upholding award of § 1988 fees to prevailing defendant after dismissal of plaintiff's § 1983 claim based on finding that it was without foundation); *cf. Sobel v. Yeshiva Univ.*, 619 F. Supp. 839, 844 (S.D. N.Y. 1985) (refusing to award fees to a *partially* prevailing defendant "in view of the strong public policy favoring civil rights plaintiffs").[1]

[1] Neither the court's research nor that of the parties have located a case in which § 1988 attorney's fees were awarded to a *partially* prevailing defendant.

Foreman was found in civil contempt for violating a temporary restraining order issued by this court. Foreman also had judgment entered against him on plaintiffs' § 1985(3) (right to travel), trespass, and intentional interference with contractual relations claims, and a permanent injunction has been entered against him in this case. Judgment was entered in favor of Foreman on plaintiffs' § 1985(3) (right to abortion) and intentional infliction of emotional distress claims. Defendant CSHL was dismissed with prejudice from the action on March 3, 1989, pursuant to Fed. R. Civ. P. 41(a)(2).

After review and consideration of the complaint and the subsequent litigation involving Foreman and CSHL, the court finds that suit against these parties was neither vexatious, frivolous, nor brought to harass or embarrass them. In Foreman's case, the court finds particularly noteworthy that he had judgment entered against him on several claims, was found in contempt for violating a temporary restraining order of this court, and had a permanent injunction entered against him. With regard to CSHL, the mere fact that plaintiffs voluntarily dismissed it from suit does not mean that the claims against it were frivolous or that it becomes a "prevailing party" for § 1988 fee purposes. *See Colombrito v. Kelly*, 764 F.2d 122, 130 (2d Cir. 1985) (§ 1988 defendant dismissed with prejudice is not considered "prevailing party"). Accordingly, the court does not find either defendant to be a "prevailing party" under § 1988 and therefore will not grant their requests for § 1988 fee awards.

D. *Other Issue*

As part of the motion filed by defendants Judith Brown and ALL, their counsel Marion Edwyn Harrison[2] refers to, and has attached to the motion, a transcript of a tele-

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[2] Harrison, a Washington, D.C. attorney, was admitted pro hac vice in this case. *See* Order filed September 13, 1988.

phone conversation between himself and plaintiffs' counsel Mary McLaughlin. *See* Defendants Brown and ALL Motion for Sanctions, Exhibit 4. Plaintiffs claim that the recording of the telephone conversation and the subsequent disclosure of its content were done without the knowledge or consent of McLaughlin. Plaintiffs further assert, and it appears to the court, that the recording of this conversation without the consent or knowledge of McLaughlin constitutes a violation of professional ethics. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) (With a limited exception not present here, "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation," based on DR 1-102(A)(4) of the Code of Professional Responsibility[3]). In addition, such recording and disclosure may also constitute a violation of state law. *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 5703 (Purdon 1983). In any event, Harrison's recording and subsequent disclosure of a telephone conversation without the knowledge or consent of the other party to the conversation represent a lack of both professional and common courtesy. In light of the possible violation of the ethical standards of the profession, I will forward a copy of this Memorandum to the appropriate state disciplinary authorities for review.

An appropriate order follows.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

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[3] Disciplinary Rule 1-102(A)(4) provides that a lawyer shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 88-5157

JANE ROE, *ET AL.*

v.

OPERATION RESCUE, *ET AL.*

ORDER

AND NOW, this 19th day of June, 1989, in accordance with the accompanying Memorandum, it is hereby Ordered that:

1. Defendant Joseph Foreman's motion for attorney's fees under Rule 11 (docket entry no. 192) is DENIED.

2. Defendant Council for the Sanctity of Human Life's (CSHL) motion for attorney's fees under Rule 11 (docket entry no. 193) is DENIED.

3. Defendants Judith Brown and American Life League, Inc.'s (ALL) motion for Rule 11 sanctions (docket entry no. 194) is DENIED.

4. Defendant Chester County Citizens Concerned About Life's (CCCCAL) motion for attorney's fees under Rule 11 (docket entry no. 197) is DENIED.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1672

JANE ROE; MARY MOE; NATIONAL ABORTION RIGHTS ACTION LEAGUE OF PENNSYLVANIA; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; REPRODUCTIVE HEALTH AND COUNSELING CENTER; WOMEN'S SUBURBAN CLINIC; ALLENTOWN WOMEN'S CENTER; NORTHEAST WOMEN'S CENTER; WOMEN'S MEDICAL SERVICES; DR. ALLEN KLINE

V.

OPERATION RESCUE; RANDALL TERRY; REVEREND JAMES P. LISANTE; PRO LIFE NONVIOLENT ACTION PROJECT OF BRONX, N.Y.; THOMAS HERLIHY; PRO LIFE NONVIOLENT ACTION PROJECT OF PHILADELPHIA; MICHAEL McMONAGLE; CHESTER COUNTY CITIZENS CONCERNED ABOUT LIFE; JOHN J. O'BRIEN; COUNCIL FOR THE SANCTITY OF HUMAN LIFE; JOSEPH FOREMAN; ADVOCATES FOR LIFE; ANDREW BURNETT; AMERICAN LIFE LEAGUE; JUDIE BROWN; DIRECT ACTION COMMITTEE; KATHY HOFFER; CRAIG HOFFER; LIFE AND FAMILY CENTER: ANDREW SCHULBERG; PRO LIFE ACTION LEAGUE: JOSEPH SCHEIDLER; PRO LIFE DIRECT ACTION LEAGUE: JOHN RYAN; OMAHA CHRISTIAN ACTION COUNCIL; DENNY HARTFORD; PRO LIFE NONVIOLENT ACTION PROJECT OF WASHINGTON, D.C.; JOHN CAVANAUGH O'KEEFE; SMITH(S), JOHN AND SMITH(S), JANE, the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of

defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein

JUDITH A. BROWN and AMERICAN LIFE LEAGUE, INC.,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 88-5157)

SUR PETITION FOR REHEARING

PRESENT: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, COWEN, NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ R. Nygaard
Circuit Judge

DATED: MAR 7 1990

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Internal Operating Procedures

April 1988

[Table of Contents omitted in printing.]

INTRODUCTION

A. Objectives.

These "Internal Operating Procedures" (IOPs) cover the essential processes of this court from the distribution of the briefs to the final termination of the appeal:

To insure that appeals are processed as expeditiously as possible consistent with a careful discharge of proper appellate responsibilities;

To foster the long established practice and traditions of this court to avoid intra-circuit conflict of decisions and to maintain the highest degree of collegiality among the judges.

B. Policy of the Court.

In order that a panel's decisions may reflect input from the entire court on the law in this circuit, these procedures are designed:

1. To insure the opportunity for contributions by every active member of the court to every decision of precedential or institutional significance.
2. To insure decisional stability of the court by providing a means for the panel system to operate efficiently and at the same time provide that a published opinion of the court expressed by a panel may not be overruled without the approval of a majority of the full court.

3. To afford judges maximum freedom in administering justice in this multi-judge court.

C. Implementation.

These IOPs implement:

1. Statutory mandates
2. Federal Rules of Appellate Procedure
3. Rules of the Court of Appeals for the Third Circuit
4. Customs, practices, and traditions of this court.

[Pages 2-11 omitted in printing.]

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred: (1) in refusing to charge on the testimony of an accomplice as requested by appellant; (2) in admitting hearsay testimony of a witness and (3) in refusing to grant a motion of acquittal on the theory of insufficiency of evidence; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

CHAPTER 7. RETAINING JURISDICTION

Where the disposition of an appeal contains an order retaining jurisdiction in this court, upon return of this court after remand to the district court, the case will be assigned to that panel which ordered the retention of jurisdiction here, or to another panel if ordered by the Chief Judge.

CHAPTER 8. HEARING OR REHEARING IN BANC CRITERIA

A. **Hearing In Banc.** Initial in banc hearing ordinarily is ordered by a majority of the active judges only if there is a determination that the case is controlled by a prior decision of the court which should be reconsidered or the case is of such great importance as to require initial consideration by the full court.

B. **Rehearing In Banc.** Rehearing in banc is not favored and ordinarily will not be ordered except

1. Where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

2. Where the proceeding involves a question of exceptional importance.

This court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

C. **Policy of Avoiding Intra-Circuit Conflict of Precedent.** It is the tradition of this court that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court in banc consideration is required to overrule a published opinion of this court.

D. **Acceleration.** The need to accelerate a case scheduled for in banc hearing will be determined by majority vote of the court. However, it is the policy of the court to hold an in banc hearing only at a regularly scheduled in banc session of the court.

CHAPTER 9. REHEARING

A. **Court Originated.**

1. **Draft opinions to be circulated.** All judgment orders and those unanimous unpublished per curiam or memorandum opinions which affirm the judgment or decision of the trial court or which grant enforcement of or deny a petition for review of agency action are not circulated beyond the panel. All other opinions are circulated by the opinion-writing judge to all active judges who are not on the panel with a request that they notify him in the event that they have comments or desire the case to be considered in banc. The active judge who has written a dissenting opinion is presumed to have voted for rehearing in banc unless he indicates in writing to the contrary.

2. **Effect of non-response.** A judge who does not desire rehearing or who has no comment is not expected to respond.

3. **Time limits.** The opinion is deemed cleared for filing on the eighth day after the date of its transmittal by the opinion-writer. A request for rehearing must be received by the opinion-writing judge within the eight-day period. If, after a judge has voted for rehearing, another judge desires more time to consider or reconsider in banc rehearing, he shall timely circulate a letter asking that the time for voting be extended for a period not to exceed five working days beyond the eight-day time period. This request results in an automatic extension. Irrespective of the number of such requests, the voting time automatically will be extended this one period only. Further extensions of time may be granted only by the Chief Judge upon application.

4. **Responsibility for order.** If, following the circulation of the draft opinion and any concurring or dissenting opinions, a majority of the active judges request that the case be considered in banc, the ranking judge who has voted for rehearing, or the opinion-writing judge, if he has voted for rehearing and is an active judge of this court, enters an order for rehearing in banc.

   After the briefs in the case have been distributed to the members of the court who will participate in the in banc consideration thereof,

* * *